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No. 98-149

In The

Supreme Court of the United States

October Term, 1997

COLLEGE SAVINGS BANK,

Petitioner,

vs.

FLORIDA PREPAID POSTSECONDARY EDUCATION EXPENSE BOARD,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Does the right to bring a claim for false advertising against a perceived competitor under § 43(a) of the Lanham Act constitute "property" such that Congress, acting pursuant to section 5 of the Fourteenth Amendment, may abrogate Eleventh Amendment immunity and make the states subject to suit in federal court on false advertising claims?

2. Does the doctrine of *Parden v. Terminal Railway of Alabama Docks Department*, 377 U.S. 184 (1964), which held that Congress may utilize its legislative authority under the Commerce Clause to compel states to "waive" their Eleventh Amendment immunity if they participate in commerce regulated by Congress, apply to claims against a state agency arising out of the state's administration and promotion of a program designed to help ensure access to higher education for the citizens of the state?

STATEMENT OF INTERESTED PARTIES

The parties are stated correctly in the "Parties to the Proceeding" on page ii of the petition for a writ of certiorari.

The Florida legislature has changed Respondent's name from Florida Prepaid Postsecondary Education Expense Board to the Florida Prepaid College Board. This Brief will refer to Respondent by the earlier name, for the sake of clarity and convenience. Respondent is a body corporate of the state of Florida and does not have any parent or subsidiary corporations.

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Respondent respectfully requests that the Court deny the petition for a writ of certiorari seeking review of the opinion of the United States Court of Appeals for the Third Circuit. The opinion of the Court of Appeals is reported at 131 F.3d 353 (3d Cir. 1997), and is reproduced in Petitioner's Appendix ("Pet. App.") at 1a-27a.

COUNTERSTATEMENT OF THE CASE

Petitioner College Savings Bank ("CSB") seeks review of a Third Circuit decision which affirmed the dismissal, on the basis of the Eleventh Amendment, of Lanham Act claims brought by CSB against respondent Florida Prepaid Postsecondary Education Expense Board ("Florida Prepaid"). Pursuant to 28 U.S.C. § 2403(a), the United States of America intervened in this action before the District Court in partial support of CSB's position. The United States filed its own appeal and was aligned with CSB before the Court of Appeals, but has elected not to file a petition for a writ of certiorari.

Florida Prepaid is an organ of the state of Florida that was created to administer a college tuition savings program. *See* Fla. Stat. § 240.551. The principal purpose of the Florida Prepaid program is to enable and encourage the people of Florida to obtain the benefits of higher education at Florida institutions by providing an easy, effective, and safe way to overcome the financial obstacles that too often have put college beyond the reach of ordinary Floridians. Participation in the program, which is generally open to Florida residents or the children of Florida residents, *see* Fla. Stat. § 240.551(2)(e)(1)-(3), ensures that money invested will grow to meet the future cost of a college education at Florida state postsecondary education institutions. The program is a top Florida priority:

> The State considers this an essential governmental operation to assist its citizens to access higher education. All legal and beneficial interests in the assets held by the trust fund are vested in the State for its exclusive benefit and the exclusive benefit of the colleges and universities; therefore, payments are guaranteed to be made on the beneficiary's behalf to the State college or university. Exercise of full benefits under the contract guarantees the beneficiary receipt of services and the beneficiary will not receive any funds.

Florida Prepaid Master Covenant, § 5.08.

The District Court found that Florida Prepaid is an "arm of the state" of Florida and thereby entitled to assert Florida's Eleventh Amendment immunity as a bar to jurisdiction in federal court. *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 948 F. Supp. 400 (D.N.J. 1996); *see* Pet. App. at 46a-58a. Neither CSB nor the United States sought review of that finding before the Court of Appeals.

CSB is a commercial financial institution that markets a certificate of deposit product designed to assist customers with investing to cover the costs of a college education. CSB owns a United States patent relating to a calculation methodology used with its certificate of deposit product. In 1994, CSB sued Florida Prepaid for patent infringement in the United States District Court for the District of New Jersey. In 1995, CSB brought a second action against Florida Prepaid in the same court, this time alleging violations of section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a). The Lanham Act claims relate exclusively to alleged false advertising by Florida Prepaid in its descriptions of its own tuition funding program. There are no allegations of false statements regarding CSB's certificate of deposit product, nor any claims for

trademark infringement, trade dress infringement, or other matters covered by the Lanham Act.

After this Court announced its decision in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), Florida Prepaid moved to dismiss both the Lanham Act action and the patent infringement action as barred by the Eleventh Amendment. The United States intervened, ostensibly to defend the constitutionality of the Trademark Remedy Clarification Act of 1992, Pub. L. No. 102-542, 106 Stat. 3567 (1992) ("the TRCA"), which had purported to make the Lanham Act applicable to the states, and the Patent and Plant Variety Protection Remedy Clarification Act, Pub. L. No. 102-560, 106 Stat. 4230 (1992), which had purported to make the states amenable to suit in federal court for patent infringement. With respect to the TRCA, however, the United States argued only that Florida Prepaid had lost its Eleventh Amendment immunity to Lanham Act suits via the "constructive waiver" doctrine of *Parden v. Terminal Railway of Alabama Docks Department*, 377 U.S. 184 (1964). CSB argued both that the *Parden* doctrine applied and that the TRCA was constitutional because Congress possessed authority under section 5 of the Fourteenth Amendment to abrogate Eleventh Amendment immunity and permit Lanham Act suits against the states.

In a single decision, the District Court granted the motion to dismiss the Lanham Act case but denied the motion to dismiss the patent infringement action. In the instant case, both CSB and the United States appealed the dismissal of the Lanham Act suit to the Third Circuit, which affirmed. In the patent infringement case, Florida Prepaid appealed the decision to the United States Court of Appeals for the Federal Circuit, which affirmed. *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 148 F.3d 1355 (Fed. Cir. 1998)[1]; *see* Pet. App. 95a-120a.

1. Florida Prepaid shortly will be filing a petition for a writ of certiorari in the patent infringement case.

REASONS FOR DENYING THE WRIT

I.

THE COURT OF APPEALS CORRECTLY APPLIED THIS COURT'S DECISIONS IN *SEMINOLE TRIBE OF FLORIDA v. FLORIDA* AND *CITY OF BOERNE v. FLORES* IN HOLDING THAT CONGRESSIONAL AUTHORIZATION OF SUITS IN FEDERAL COURT AGAINST THE STATES ON FALSE ADVERTISING CLAIMS CANNOT BE JUSTIFIED AS ABROGATION OF THE ELEVENTH AMENDMENT THROUGH AN EXERCISE OF FOURTEENTH AMENDMENT ENFORCEMENT POWER.

The decision of the Court of Appeals for the Third Circuit ("the Court of Appeals") is manifestly correct, and no further review is required. CSB asks this Court to grant certiorari in order to consider a sweeping theory of property rights that the Court of Appeals properly rejected and that this Court surely would reject as well. The tightly confined holding of the Court of Appeals is consistent with this Court's precedents, and does not conflict with any other appellate decision. Although more work remains to be done in order to explore and explain fully the implications of this Court's opinion in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), that work must await a case that squarely presents an unresolved issue of genuine import. The instant case, which involves an unusually narrow legal question that clearly has been correctly decided, offers nothing worthy of review. Accordingly, this Court should deny the petition for a writ of certiorari.

In *Seminole Tribe*, this Court held that Congress has no power under the Indian Commerce Clause or the Interstate Commerce Clause to abrogate the Eleventh Amendment immunity enjoyed by the states. As the Court of Appeals recognized, the holding of

Seminole Tribe is squarely applicable here. The Lanham Act represents an exercise of congressional power under the Interstate Commerce Clause. *See, e.g., Trade-Mark Cases*, 100 U.S. 82, 94-96 (1879) (stating that congressional power to provide trademark protection can arise only from the power to regulate interstate commerce). Thus, claims brought under the Lanham Act against a state or state agency in federal court pursuant to the TRCA must be dismissed as barred by the Eleventh Amendment.

To overcome this limitation on congressional power and rescue the TRCA from unconstitutionality, CSB argues that the statute can be treated as an exercise of Congress's enforcement power under section 5 of the Fourteenth Amendment. This argument requires that a person's interest in being free from the type of false advertising alleged here by CSB be deemed a "property" right, so that the Fourteenth Amendment may be triggered. Indeed, according to CSB, because a "business" is a form of property, any state action that affects a business in any way is a potential impingement upon property that Congress may forbid under the Fourteenth Amendment. *See* Petition for a Writ of Certiorari ("Pet.") at 16-19. The Eleventh Amendment, it would appear, simply has no force where a "business" is concerned.

After *Seminole Tribe*, however, courts must be wary of accepting a contention that a particular congressional attempt to abrogate Eleventh Amendment immunity is a legitimate exercise of Fourteenth Amendment power. *Seminole Tribe* makes it perfectly plain that Congress enjoys no power to abrogate Eleventh Amendment immunity under *any* provision of Article I of the Constitution. Courts, therefore, must be vigilant so that congressional enforcement power under section 5 of the Fourteenth Amendment, which applies only to the substantive provisions of that Amendment, is not improperly converted into a replacement for the entirety of Article I. Congress is not free to transform exercises of Article I power into applications of Fourteenth

Amendment enforcement authority simply because the Fourteenth Amendment is Congress's only remaining source of power to abrogate the Eleventh Amendment. Judicial recognition of such pretextual invocations of Fourteenth Amendment power would flout the rule of *Seminole Tribe* and would eviscerate the Eleventh Amendment. "The need to promote the supremacy of federal law must be accommodated to the constitutional immunity of the States." *Idaho v. Coeur d'Alene Tribe of Idaho*, 117 S. Ct. 2028, 2038 (1997) (quoting *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 105 (1984)).

Post-*Seminole Tribe* decisions that have upheld congressional abrogations of Eleventh Amendment immunity have done so where the guarantees of the Fourteenth Amendment were very closely implicated. In *Wheeling & Lake Erie Railway Co. v. Public Utility Commission of Pennsylvania*, 141 F.3d 88, 93-94 (3d Cir. 1998), the Third Circuit held that the Railroad Revitalization and Regulatory Reform (4-R) Act of 1976, 49 U.S.C. § 11501, was a valid exercise of section 5 enforcement power because it protected railroads against discriminatory taxes levied by state and local authorities in violation of the railroads' equal protection rights.[2] *See id.* at 93. *See also Doe v. University of Illinois*, 138 F.3d 653, 660 (7th Cir. 1998) (upholding abrogation accomplished through enactment of Title IX as designed to protect against invidious discrimination in state-run, federally funded institutions); *Young v. Pennsylvania House of Representatives Republican Caucus*, 994 F. Supp. 282, 287-88 (M.D. Pa. 1998) (upholding abrogation accomplished through ADEA, 29 U.S.C. §§ 621-634, as valid section 5 enforcement of equal protection rights).

In contrast, courts have invalidated attempted abrogations of Eleventh Amendment immunity where the right sought to be protected was more a creature of Article I than a substantive

2. The court also noted that its decision in *College Savings Bank v. Florida Prepaid* was "limited to its facts." *Id.* at 94.

guarantee of the Fourteenth Amendment. *See, e.g., Chavez v. Arte Publico Press*, 139 F.3d 504, 508-12 (5th Cir. 1998) (rejecting attempted abrogation of immunity for copyright infringement suits), *pet. for reh'g pending*; *In re Sacred Heart Hospital of Norristown*, 133 F.3d 237, 243-45 (3d Cir. 1998) (rejecting attempted abrogation via the Bankruptcy Code and noting that there is no constitutional right to a bankruptcy discharge) (citing *United States v. Kras*, 409 U.S. 434, 446-47 (1973)).

A notable law review commentary has explained the jeopardy to the Eleventh Amendment created by unjustified congressional reliance on Fourteenth Amendment authority to protect congressionally created rights:

> In *Seminole Tribe*, the Court held that Congress has the power to abrogate Eleventh Amendment immunity pursuant to its power to enforce the Fourteenth Amendment, but not under its Article I legislative power. The Fourteenth Amendment, however, includes a clause prohibiting states from depriving persons of property without due process of law. Can Congress pass a statute giving individuals a property right vis-a-vis the states and then, to "enforce" the Due Process Clause, abrogate the states' Eleventh Amendment immunity with respect to suits to enforce that right? An affirmative answer to this question threatens to reduce *Seminole Tribe*'s abrogation holding to nothing. . . . If this reasoning were to hold, then Congress's power to abrogate Eleventh Amendment immunity would appear to be coextensive with its power to legislate under Article I, and, if so, *Seminole Tribe*'s holding that Congress lacks the power to abrogate Eleventh Amendment immunity under Article I would be eviscerated.

Carlos Manuel Vazquez, *What Is Eleventh Amendment Immunity?*, 106 Yale L.J. 1683, 1744-46 (1997); *see also* Henry Paul Monaghan, *Comment: The Sovereign Immunity "Exception,"* 110 Harv. L. Rev. 102, 126 n.162 (1996) ("Whether the *Seminole Tribe* majority would permit so transparent an evisceration of its holdings is unclear."). Here, the Court of Appeals properly declined CSB's invitation to "eviscerate" the Eleventh Amendment. In so doing, the Third Circuit followed the teachings of this Court on both Eleventh Amendment and Fourteenth Amendment issues.

There is no historical tradition linking the Lanham Act and the Fourteenth Amendment. The Lanham Act always has been regarded as an exercise of the power to regulate commerce.[3] The legislative history of the TRCA, which amended the Lanham Act to permit suits against the states, contains only a passing reference to the Fourteenth Amendment as a source of authority for congressional abrogation of immunity for trademark infringement suits, *see* S. Rep. No. 102-280 (May 12, 1992), at 7-8, and is completely silent with respect to the *false advertising* prong of the Lanham Act, which is all that is involved here. Thus, there is no direct support for the view that Congress intended to use its Fourteenth Amendment power to permit suits against the states in federal courts on federal false advertising claims.

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3. The legislative history of the Lanham Act states:

> Marks used in interstate commerce are properly the subject of Federal regulation. It would seem as if national legislation along national lines securing to the owners of trade-marks in interstate commerce definite rights should be enacted and should be enacted now. There can be no doubt under the recent decisions of the Supreme Court of the constitutionality of a national act giving substantive as distinguished from merely procedural rights in trade-marks in commerce over which Congress has plenary power.

S. Rep. No. 1333 (May 14, 1946), at 1277.

The brief mention of the Fourteenth Amendment in the legislative history does not convert the TRCA into an *appropriate* exercise of Fourteenth Amendment enforcement authority with respect to false advertising claims under the Lanham Act. *See Oregon v. Mitchell*, 400 U.S. 112, 129 (1970); *Ex Parte Virginia*, 100 U.S. 339, 345-46 (1879). The courts retain the ultimate responsibility for determining whether a given enactment is a legitimate exercise of Fourteenth Amendment power:

> [A]bsent an outright congressional declamation, it is the court's task to decipher whether Congress has enacted legislation pursuant to its section 5 powers. In so doing, the cryptology is largely dependent upon judicial ability to discern, given a fair reading of the statute and an impartial assessment of the circumstances of its passage, some legislative purpose or factual predicate adequate to support the exercise of that power. ... Such an inquiry necessarily focuses upon whether or not the objectives of the legislation are within the scope of Congress' power under section 5 of the Fourteenth Amendment.

Ramirez v. Puerto Rico Fire Service, 715 F.2d 694, 698 (11th Cir. 1983) (citations omitted); *see also EEOC v. Elrod*, 674 F.2d 601, 608 (7th Cir. 1982) (stating that "the inquiry is whether the *objectives* of the legislation are within Congress' power under the amendment") (emphasis in original).

Fitzpatrick v. Bitzer, 427 U.S. 445 (1976), where this Court first announced the doctrine that Congress may abrogate Eleventh Amendment immunity pursuant to the Fourteenth Amendment, did not directly answer the question of how to identify appropriate Fourteenth Amendment enforcement action. There was no need to do so in that case, because the issue was not in dispute in

Fitzpatrick, a Title VII case that clearly implicated core Fourteenth Amendment concerns. *See* 427 U.S. at 453 n.9. The *Fitzpatrick* Court nevertheless emphasized that the purpose of section 5 is to enforce the guarantees of the Fourteenth Amendment. *See id.* at 453-56. If, as here, the protections of the Fourteenth Amendment are completely inapposite to the legislation in question, the statute cannot be considered an appropriate exercise of Fourteenth Amendment authority.

This Court recently reaffirmed its teaching that Congress's power under section 5 of the Fourteenth Amendment is remedial, not substantive, in *City of Boerne v. Flores*, 117 S. Ct. 2157 (1997). "Any suggestion that Congress has a substantive, non-remedial power under the Fourteenth Amendment is not supported by our case law." *Id.* at 2167. Congress may enforce the guarantees of the Fourteenth Amendment as they have been interpreted by the courts, but Congress may not extend or reinterpret those protections:

> If Congress could define its own powers by altering the Fourteenth Amendment's meaning, no longer would the Constitution be "superior paramount law, unchangeable by ordinary means." . . . Under this approach, it is difficult to conceive of a principle that would limit congressional power.

Id. at 2167 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

CSB argues that the TRCA does rest, at least in part, on the enforcement authority of the Fourteenth Amendment because the Act was intended to protect "property." As applied to the Lanham Act claims asserted here, however, CSB's argument fails because this case does not directly involve any kind of property. The Lanham Act claims brought against Florida Prepaid are complaints

about alleged false advertising. CSB has not asserted any claims for trademark infringement.

The false advertising prong of the Lanham Act is separate and distinct from the trademark infringement prong. *See, e.g., Stanfield v. Osborne Industries*, 52 F.3d 867, 873 (10th Cir.) (finding "two distinct bases of liability under [15 U.S.C.] section 1125"), *cert. denied*, 516 U.S. 920 (1995); *Parameter Driven Software v. Massachusetts Bay Insurance Co.*, 25 F.3d 332, 337 (6th Cir. 1994); *Agee v. Paramount Communications, Inc.*, 853 F. Supp. 778, 790 (S.D.N.Y. 1994) (noting that "[s]ection 43(a) [of the Lanham Act] provides two distinct causes of action. . . . 'product infringement' claims, and . . . 'false advertising' claims"), *aff'd in part & rev'd in part*, 59 F.3d 317 (2d Cir. 1995). An interest in being free of alleged false advertising simply does not qualify as a property right for purposes of the due process clause of the Fourteenth Amendment. "A false advertising claim implicates the Lanham Act's purpose of preventing unfair competition," *Stanfield*, 52 F.3d at 873, but does not implicate the substantive guarantees of the Fourteenth Amendment, and therefore cannot be the basis for the abrogation of Eleventh Amendment immunity.

CSB cites cases discussing the Lanham Act's general protection of "property rights." *See* Pet. at 16-17. None of these cases, however, holds that a *false advertising claim* constitutes a property right, let alone a right that may be enforced via the Fourteenth Amendment. CSB is left to rely on cases discussing trademark rights or "unfair competition" in generic terms. Florida Prepaid is accused of nothing more than making misrepresentations about *its own* tuition payment program. CSB's interest in opposing such statements may create a right of action under the Lanham Act, but does not create a property right in such opposition.

According to CSB, the tort of unfair competition, "by definition," protects property interests. Pet. at 16. Virtually every

conceivable tort, however, relates in some fashion to either property interests or personal interests. If these interests, merely because they are "protected" by tort law, are deemed to constitute property or liberty rights subject to Fourteenth Amendment guarantees, then under CSB's analysis Congress would have the authority to make the states amenable to suit in federal court on any common law tort, as long as it had been "federalized" through legislation. *See* Pet. at 16 ("[T]he Fourteenth Amendment, by affording protection to 'property,' by its terms extends to the tort of unfair competition."). The Court of Appeals understood the implications of CSB's extreme position, and rightly rejected CSB's argument.

CSB relies heavily on the notion that a "business" is a property right. This Court has never held, however, that the Due Process Clause of the Fourteenth Amendment protects the right to be free in one's business from a competitor's false advertising, even if the alleged false advertising comes from a state actor. The connection between such conduct and a genuine, protectible property right is simply too tenuous. Thus, even an unequivocal congressional attempt to constitutionalize causes of action for false advertising would fail to pass muster under the rule of *City of Boerne*. Congress lacks the authority to craft its own applications of the Due Process Clause, particularly where the resulting remedial scheme imposes "a heavy litigation burden on the States" and "contradicts vital principles necessary to maintain separation of powers and the federal balance." *City of Boerne*, 117 S. Ct. at 2171, 2172.

Tellingly, CSB's expansive theory of business torts and the Fourteenth Amendment should have compelled a different result in *Seminole Tribe* itself.[4] The CSB logic is inexorable: A casino is

4. The Court of Appeals for the Eleventh Circuit rejected a more narrowly conceived Fourteenth Amendment argument in *Seminole Tribe*. *Seminole Tribe of Florida v. Florida*, 11 F.3d 1016, 1025 (11th Cir. 1994), *aff'd*, 517 U.S. 44 (1996). The Tribe gave up and did not press the clearly meritless argument before this Court.

a business; therefore, the right to operate a casino is a property right with which the state may not "interfere" without violating the Fourteenth Amendment. If the state of Florida, in alleged violation of a federal statute, refuses to negotiate a gaming compact with an Indian tribe, thus "interfering" with the Tribe's right to operate a casino, the Tribe may sue the state in federal court. The result is that the Eleventh Amendment is swept away by the Fourteenth. This syllogism is every bit as plausible as CSB's argument that it should be able to sue Florida Prepaid for false advertising. The fact that both this Court and the Eleventh Circuit appeared to overlook this analysis in *Seminole Tribe*, however, strongly suggests that the argument is merely sophistry.

This case simply does not involve property that Congress may protect under the Fourteenth Amendment. Congress has no power, under the Fourteenth Amendment or any other provision of the Constitution, to strip the states of their Eleventh Amendment immunity and subject them to suits for false advertising. To hold otherwise would be to dismiss the Eleventh Amendment altogether. The question is not, as CSB puts it, whether property rights may be "bifurcated" into those that are protected by the Fourteenth Amendment and those that are not. Pet. at 15, 22. The real question is whether simply labeling an interest as "property" automatically confers upon Congress the power to legislate without regard for the Eleventh Amendment. The Court of Appeals has answered that question correctly: No.[5]

5. CSB accuses the Court of Appeals of "confusion," Pet. at 22, merely because the court properly limited its decision to the case before it, which involved only allegations that a state actor had engaged in false advertising by misleadingly describing *its own* products. CSB mistakenly claims that there is "no principled distinction" between misrepresentations concerning one's own product and misrepresentations concerning a competitor's product. Pet. at 21. The difference is in the degree to which the misrepresentations can cause direct harm to the competitor. CSB's failure to recognize this distinction demonstrates the invalidity of CSB's "one size fits all" theory of business property rights, which refuses to acknowledge that some impacts on property can be too remote to constitute deprivations in violation of due process.

Finally, the conflict alleged by CSB between the decision below and the decision of the Federal Circuit in *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 148 F.3d 1355 (Fed. Cir. 1998), does not warrant granting certiorari in this case. The instant case concerns a narrow provision of the Lanham Act that likely would seldom be applied to the states, whereas the Federal Circuit's decision involves the fertile litigation ground of patent infringement. Florida Prepaid agrees that the two decisions advance opposing theories of the relationship between the Eleventh Amendment and the Fourteenth Amendment, but granting certiorari here would not enable the Court to address that dispute because of the unusual facts of this case and because the narrow decision of the Third Circuit is so clearly correct. The decision fits so well into the complex of existing law that it is likely to have very limited importance as a precedent in its own right.

The real cause of the conflicting rationales of the two opinions is the Federal Circuit's refusal to acknowledge any limits on congressional power to use the Fourteenth Amendment to protect rights created under Article I.[6] The only way to review that position effectively would be to issue a writ of certiorari to the Federal Circuit. As noted above, Florida Prepaid intends to file a petition for a writ of certiorari in the patent infringement action, which involves a close legal issue of greater importance, broader application, and greater frequency of occurrence than false advertising under the Lanham Act, and thus would be a far superior vehicle for refinement of the rule of *Seminole Tribe*.[7] The

6. In this respect, the opinion of the Federal Circuit also is at odds with the decision of the Fifth Circuit in the *Chavez* case.

7. While the decision of the Third Circuit follows directly from the teachings of *Seminole Tribe* and Fourteenth Amendment jurisprudence, these same authorities cast serious doubt upon the abrogation of Eleventh (Cont'd)

application of *Seminole Tribe* to patent infringement litigation, which raises significant issues that can be settled only by this Court, is unrelated to the limited and plainly correct decision of the Third Circuit in the instant Lanham Act case.

Accordingly, the TRCA is unconstitutional as applied in this case, as the Court of Appeals properly held. This Court should deny the writ because nothing would be gained from the review of a clearly correct, narrowly focused decision.

II.

THE COURT OF APPEALS PROPERLY HELD THAT THE DOCTRINE OF "CONSTRUCTIVE WAIVER" OF *PARDEN v. TERMINAL RAILWAY OF ALABAMA DOCKS DEPARTMENT* DOES NOT APPLY TO A STATE'S EFFORTS TO FOSTER ITS CITIZENS' EDUCATIONAL ATTAINMENT.

After *Seminole Tribe*, Congress can no longer claim authority under Article I of the Constitution to abrogate state sovereign immunity. Petitioner therefore resorts to the "constructive waiver" doctrine of *Parden v. Terminal Railway of Alabama Docks Department*, 377 U.S. 184 (1964), as a basis for jurisdiction. *Parden* held that a state which engages in commercial activities

(Cont'd)
Amendment sovereign immunity in patent infringement litigation. The overly broad view of Fourteenth Amendment enforcement power espoused by the Federal Circuit, which is fundamentally at odds with *Seminole Tribe* and threatens to reduce the constitutional principles of the Eleventh Amendment to a matter of congressional discretion, is worthy of review by this Court. This is all the more so because that mistaken approach to patent infringement litigation will have a pervasive, nationwide adverse impact on the states, and is not open to challenge in patent litigation in other circuits because the Federal Circuit has exclusive jurisdiction over patent appeals.

subject to congressional regulation relinquishes its Eleventh Amendment immunity and subjects itself to suit in federal court for claims relating to those activities. *See* 377 U.S. at 192.

A. The *Parden* Doctrine Cannot Apply Here Because Florida Prepaid Is An Agency Of The State Of Florida Carrying Out A Core Governmental Function, And Because The Lanham Act Does Not Provide The Notice Required To Create A Waiver Of Eleventh Amendment Immunity.

Even if the *Parden* waiver doctrine remained viable after *Seminole Tribe*, it could apply only to situations where a state is involved in an area of commerce not normally occupied by government. *See Employees v. Missouri Department of Public Health & Welfare*, 411 U.S. 279, 284-85 (1973). CSB argues, however, that Florida Prepaid is engaged in a proprietary enterprise not traditionally occupied by state government, and is therefore vulnerable to *Parden*. *See* Pet. at 25-27. This contention is wrong. Florida Prepaid helps the state of Florida to provide education — an undeniably central function of state government. Accordingly, *Parden* cannot apply to the activities of Florida Prepaid.

Florida Prepaid's primary goal is advancing education. This Court long has recognized the fact that "education is perhaps the most important function of state government." *Brown v. Board of Education*, 347 U.S. 483, 493 (1954). The Court recently reaffirmed that education is an area "where States historically have been sovereign." *United States v. Lopez*, 514 U.S. 549, 564 (1995). In *Lopez*, a case not involving the Eleventh Amendment, this Court struck down legislation founded on a sweeping interpretation of congressional power under the Commerce Clause. *See also Skehan v. State System of Higher Education*, 815 F.2d 244, 247-49 (3d Cir. 1987) (holding that the Pennsylvania State System of Higher Education, "a body corporate and politic" created by state law to administer educational institutions, was entitled to claim Eleventh

Amendment immunity, and stating that "[p]roviding education has long been recognized as a function of state government").

CSB largely disregards the promotion of educational objectives in its discussion of the activities of Florida Prepaid. Certainly, providing a state agency which exists for the purpose of helping people pay for the education of Florida citizens at Florida universities and community colleges is vital to Florida's attainment of its educational objectives in operating these institutions; an empty school that citizens cannot afford to attend does nothing to achieve the goal of education.[8] Florida Prepaid provides a substantial benefit that directly and significantly promotes the educational objectives of the State of Florida, as the Court of Appeals found:

> Florida Prepaid serves the important government interest of education by making it affordable to its citizens.

Pet. App. at 24a.

CSB's argument that *Parden* was applied incorrectly is based entirely on the fact that prepaid tuition programs are not operated *exclusively* by state governments. This argument badly misses the mark. Florida Prepaid pursues the larger goal of making higher education available and affordable to its citizens, and that is a traditional state activity — a core function of the states. State governments operate college and university systems that, in appropriate cases, can assert Eleventh Amendment immunity. *See, e.g., Regents of the University of California v. Doe*, 117 S. Ct. 900, 902 & n.2 (1997) (noting the Ninth Circuit's recognition of

8. Other states are pursuing similar education strategies. *See, e.g., Michigan v. United States*, 40 F.3d 817 (6th Cir. 1994) (holding that Michigan Education Trust, a state entity operating a prepaid tuition program, has tax-exempt status).

immunity of the University of California). Obviously, however, states are not the exclusive administrators of such institutions. Under CSB's view, a state university always would be subject to the *Parden* doctrine, and thus never could claim the protection of the Eleventh Amendment. Indeed, CSB's crudely literal reading of the formula in *Parden* that a state may waive its immunity if it "leaves the sphere that is exclusively its own," Pet. at 24 (quoting 377 U.S. at 196), would strip states of their immunity for doing anything other than operating a legislature, an executive and a judiciary. The Court of Appeals correctly held that *Employees v. Missouri Department of Public Health & Welfare*, 411 U.S. 279, 284-85 (1973), modified *Parden* by expanding the scope of important state activities that would not implicate constructive waivers of sovereign immunity. *See* Pet. App. at 19a.

Because Florida Prepaid is performing a role traditionally undertaken by state governments — making available affordable educational benefits — the Court of Appeals properly held that the *Parden* doctrine cannot apply to eliminate Florida Prepaid's immunity under the Eleventh Amendment. This Court has no need to review that correct result.[9]

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9. There are two additional reasons for declining to apply *Parden* in this case, even assuming that the doctrine itself is viable. First, the Florida Prepaid activity attacked here predates the congressional attempt to make the state amenable to suit under the Lanham Act. The Florida Prepaid program was enacted in 1987 and began operations in 1988. The TRCA did not become effective until October 27, 1992. Thus, Florida Prepaid was engaged in the activity of education financing years before Congress purported to condition participation in such activity on a "waiver" of sovereign immunity. Nothing in *Parden* suggests that Congress can extract a retroactive waiver from states engaged in activities newly subject to legislation. *See Close v. New York*, 125 F.2d 31, 40 (2d Cir. 1997) ("[G]iven that New York had employees before the enactment of the FLSA and before it was made applicable to the States, its continued status as an employer cannot realistically be construed as a waiver of immunity.").

(Cont'd)

B. The *Parden* Doctrine Does Not Warrant Further Attention From This Court Because It Is Fundamentally Inconsistent With The Teachings Of *Seminole Tribe*, Which Established That Congress Has No Power Under The Commerce Clause To Curtail Eleventh Amendment Immunity.

Even if the application by the Court of Appeals of the *Parden* doctrine to the facts of this case were open to criticism, it would serve no purpose for this Court to grant certiorari in order to review that application. After *Seminole Tribe*, the *Parden* doctrine has no future as part of our constitutional jurisprudence, and therefore deserves no consideration from this Court. Only in the unlikely event of a holding from a court of appeals that the *Parden* doctrine remains viable would this Court have reason to grant certiorari to confirm that *Parden* does not survive *Seminole Tribe*. The decision of the Court of Appeals here, merely declining to apply *Parden*, need not be disturbed.

If the teaching of *Seminole Tribe* is followed, a state's mere participation in an area subject to legislation that includes a congressional attempt to curtail sovereign immunity cannot create

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(Cont'd)

Moreover, only a strained reading of the TRCA can support the hypothesis that Congress has alerted states to the loss of their Eleventh Amendment immunity as the consequence of their decision to operate prepaid tuition programs. The TRCA has nothing in particular to do with prepaid tuition programs or other such financial mechanisms. The Act applies to commerce in general, not to any special area of commerce, and thus cannot reasonably be deemed to "warn" a state of a loss of sovereign immunity resulting from participation in a defined type of commerce. Florida Prepaid therefore respectfully disagrees with the view of the Court of Appeals that *Parden* can be triggered because "the [TRCA] declares that if a state or its instrumentality chooses to engage in a proprietary activity that potentially falls under the Lanham Act, it can be held liable in federal court for violations of that Act." Pet. App. at 21a.

a "waiver" of immunity. It would be absurd, and contrary to *Seminole Tribe*, to permit an unlawful, invalid attempt to abrogate the Eleventh Amendment actually to achieve the same result by positing a "waiver" that arises out of nothing more than a state's carrying out its activities in the regulated area. Congress cannot achieve indirectly, through "waiver," what it cannot do directly, through express abrogation.

Parden permits Congress to require states to cede their immunity. Accordingly, a *Parden* waiver can occur only where Congress retains authority to curtail the Eleventh Amendment. No such areas remain, however, except for those subject to the nonsubstantive, remedial enforcement power of the Fourteenth Amendment. And even in those few areas, *Parden* is superfluous. The requirement that Congress expressly declare its intent to subject the states to suit, *see Welch v. Texas Department of Highways & Public Transportation*, 483 U.S. 468, 478 (1987), means that any legislation enacted pursuant to an appropriate exercise of section 5 enforcement authority will itself abrogate Eleventh Amendment immunity, making a later finding of "waiver" under *Parden* unnecessary and beside the point.

The decision in *Parden* to the effect that states could implicitly waive their Eleventh Amendment immunity through participation in a regulated field was inextricably linked to — indeed, was based on — the view of this Court in 1964 that Congress enjoyed authority under the Commerce Clause to curtail Eleventh Amendment immunity. Squarely addressing the question of congressional authority, the *Parden* Court stated:

> Respondents contend that Congress is without power, in view of the immunity doctrine, thus to subject a State to suit. We disagree. Congress enacted the FELA [Federal Employers' Liability Act] *in the exercise of its constitutional power to regulate*

> *interstate commerce*. . . . While a State's immunity from suit by a citizen without its consent has been said to be rooted in "the inherent nature of sovereignty," . . . *the States surrendered a portion of their sovereignty when they granted Congress the power to regulate commerce*. . . . By empowering Congress to regulate commerce, then, the States necessarily surrendered any portion of their sovereignty that would stand in the way of such regulation. Since imposition of the FELA right of action upon interstate railroads is within congressional regulatory power, it must follow that application of the Act to such a railroad cannot be precluded by sovereign immunity.

377 U.S. at 191-92 (emphasis added; citations and footnotes omitted). The suggestion that Alabama, the state in question, "necessarily consented" to suit by operating the railroad, *id.* at 192, was the conclusion, rather than the premise, of the Court's reasoning regarding the Commerce Clause and the Eleventh Amendment.

The holding of *Parden* depends on a now discredited view of congressional authority under the Commerce Clause to restrict Eleventh Amendment immunity.[10] This Court correctly summarized the essential holding of *Parden* in *Welch*, where the Court applied to the *Parden* doctrine the requirement of *Atascadero State Hospital v. Scanlon*, 473 U.S. 234 (1985), that "an abrogation of Eleventh Amendment immunity by Congress must be expressed in unmistakably clear language." *Welch*, 483 U.S. at 478. The Court also noted that "we have no occasion in this case to consider the validity of the additional holding in *Parden*, that Congress has the power to abrogate the States' Eleventh Amendment immunity

10. *See, e.g.*, Vazquez, 106 Yale L.J. at 1698 & n.67 (describing Justice Brennan's view in *Parden* as "a broad theory of congressional power to abrogate sovereign immunity under Article I").

under the Commerce Clause to the extent that the States are engaged in interstate commerce." *Id.* at 478 n.8. Clearly, the Court in *Welch* saw little reason to distinguish between the nomenclature of "waiver" and that of "abrogation"; the practical effect of the elimination of Eleventh Amendment immunity by congressional action was correctly deemed the only relevant consideration.

Moreover, in *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989), the case that finally stated unambiguously that the Commerce Clause authorizes Congress to abrogate state immunity (and which now has been overruled by *Seminole Tribe*), Justices on both sides of the issue acknowledged that *Parden*'s continued vitality depends on whether or not direct abrogation authority exists under the Commerce Clause. The plurality opinion observed:

> Though we have never squarely resolved this issue of congressional power, our decisions mark a trail unmistakably leading to the conclusion that Congress may permit suits against the States for money damages. The trail begins with *Parden v. Terminal Railway of Alabama Docks Dept.*, 377 U.S. 184 (1964). There, in responding to a state-owned railway's argument that Congress had no authority to subject the railway to suit, we concluded that "the States surrendered a portion of their sovereignty when they granted Congress the power to regulate commerce," *id.*, at 191, and that "[b]y empowering Congress to regulate commerce, . . . the States necessarily surrendered any portion of their sovereignty that would stand in the way of such regulation," *id.*, at 192. Although it is true that we have referred to *Parden* as a case involving a waiver of immunity, *Fitzpatrick v. Bitzer*, 427 U.S. 445, 451 (1976), the statements quoted above lay a firm foundation for the argument that Congress' authority

> to regulate commerce includes the authority directly to abrogate States' immunity from suit.

491 U.S. at 14. Thus, if "the argument that Congress' authority to regulate commerce includes the authority directly to abrogate States' immunity from suit" is rejected, as it was in *Seminole Tribe*, *Parden* must be rejected as well.

Dissenting in *Union Gas*, Justice Scalia, who was part of the majority in *Seminole Tribe*,[11] argued that even viewing *Parden* as a waiver case could not save it from constitutional infirmity under the analysis that eventually triumphed in *Seminole Tribe*:

> *Parden* is the only case in which we have held that the Federal Government can demand, as a condition to its permission of state action regulable under the Commerce Clause, the waiver of state sovereign immunity. . . . [I]n *Welch*, we overruled *Parden* insofar as that case spoke to the clarity of language necessary to constitute such a demand. . . . We explicitly declined to address, however, the continuing validity of *Parden*'s holding that the Commerce Clause provided the constitutional power to make such a demand. . . . I would drop the other shoe.
>
> There are obvious and fatal difficulties in acknowledging such a power if no Commerce Clause power to abrogate state sovereign immunity exists. All congressional creations of private rights of action attach recovery to the defendant's commission of some act, or possession of some status, in a field where Congress has authority to

11. This portion of Justice Scalia's opinion in *Union Gas* was joined by Chief Justice Rehnquist, Justice O'Connor, and Justice Kennedy.

regulate conduct. Thus, *all* federal prescriptions are, insofar as their prospective application is concerned, in a sense conditional, and — to the extent that the objects of the prescriptions consciously engage in the activity or hold the status that produces liability — can be redescribed as invitation to "waiver." . . . [T]o acknowledge that the Federal Government can make the waiver of state sovereign immunity a condition to the State's action in a field that Congress has authority to regulate is substantially the same as acknowledging that the Federal Government can eliminate state sovereign immunity in the exercise of its Article I powers. . . . There is little more than a verbal distinction between saying that Congress can make the Commonwealth of Pennsylvania liable to private parties for hazardous-waste cleanup costs on sites that the Commonwealth owns and operates, and saying the same thing but adding at the end "if the Commonwealth chooses to own and operate them." If state sovereign immunity has any reality, it must mean more than this.

Union Gas, 491 U.S. at 42-44 (Scalia, J., concurring in part and dissenting in part) (citations and footnotes omitted).

Justice Scalia's prescient opinion in *Union Gas* makes clear that because Congress has no power to abrogate Eleventh Amendment immunity under the Commerce Clause, *Parden*-style waivers are impossible. After *Seminole Tribe*, then, the only issue remaining is a rather academic one, namely, whether any further express action by this Court is necessary to dispose of *Parden*'s remnants. Florida Prepaid submits that a fair reading of *Seminole Tribe*, in light of the history and constitutional foundation of the *Parden* doctrine, compels the conclusion that *Seminole Tribe* itself abolished the *Parden* waiver doctrine. Congress's power to extract

a "waiver" from states must rest on some constitutional foundation, for Congress cannot act absent such authority. The only possible source of that power — indeed, the source explicitly identified in *Parden* — is the Commerce Clause. Once it has been determined that the Commerce Clause does not authorize Congress to curtail Eleventh Amendment immunity, then the only constitutional underpinning of the *Parden* doctrine has been destroyed. It is simply a necessary corollary of the holding in *Seminole Tribe* that *Parden*-based constructive waivers have been eliminated.

The District Court below held, as Florida Prepaid argued, that *Parden* did not survive *Seminole Tribe*. *See* Pet. App. at 68a-73a. The Court of Appeals found it unnecessary to reach this issue because of its holding that *Parden* was inapplicable on its own terms. Thus, granting certiorari on the *Parden* issue would accomplish little. It would not justify the expenditure of resources by this Court to review the correct application of *Parden* by the Third Circuit here or to confirm the demise of the *Parden* doctrine already recognized by lower courts.[12]

The *Parden* doctrine, never robust, is now a dead letter. The Court of Appeals for the Fifth Circuit already has reached precisely that conclusion. *Chavez v. Arte Publico Press*, 139 F.3d 504, 508 (5th Cir. 1998) (holding that "[a] fair reading of *Seminole*" compels the conclusion that forced waivers of immunity are impermissible), *pet. for reh'g pending*. Other courts have recognized this legal reality. The Fourth Circuit has acknowledged:

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12. An affirmance of the holding of the Court of Appeals would simply confirm the severely limited scope of a doctrine that was virtually never applied even before *Seminole Tribe*. According to the Eleventh Circuit, the *Parden* doctrine was barely viable even before this Court's decision in *Seminole Tribe*: "[A]lthough *Parden* may not be entirely dead, it certainly is not quick enough to breathe life into the Indian tribes' claims in these cases." *Seminole Tribe*, 11 F.3d at 1023.

> We realize that the power to define waiver can become the functional equivalent of the power to abrogate. Indeed, defining waiver as anything less than "the sort of voluntary choice which we generally associate with the concept of constitutional waiver" permits Congress to do indirectly what it perhaps could not do otherwise.

AER-Aerotron, Inc. v. Texas Department of Transportation, 104 F.3d 677, 681 (4th Cir. 1997) (quoting *Employees v. Missouri Department of Public Health & Welfare*, 411 U.S. 279, 296 (1973) (Marshall, J., concurring)). One of the members of the *AER-Aerotron* panel faced the issue even more directly in a concurrence:

> [I]f *Seminole Tribe* made anything clear, it is that Eleventh Amendment immunity is a function of a State's sovereign constitutional status, not Congress' Article I powers. . . . *Seminole Tribe* held that Congress' Article I powers are irrelevant to an Eleventh Amendment waiver. Instead, a state's actions waive immunity when such actions are independently sufficient under Eleventh Amendment doctrine.

104 F.3d at 683 (Niemeyer, J., concurring). The Second Circuit has been equally blunt:

> *Parden*'s viability, in light of *Seminole Tribe*, is precarious. If Congress no longer has the power to abrogate state sovereign immunity under Article I, constructive consent should not become a shunt to Article III bypassing the mandate of the Supreme Court.

Close v. New York, 125 F.3d 31, 40-41 (2d Cir. 1997); *see also American Federation of State, County & Municipal Employees v. Virginia*, 949 F. Supp. 438, 442 (W.D. Va. 1996) (holding that *Seminole Tribe* "essentially rejected" the reasoning of *Parden*), *aff'd on other grounds*, 145 F.3d 182 (4th Cir. 1998).

In sum, the *Parden* waiver doctrine is based on a premise that this Court re-examined and rejected in *Seminole Tribe*. It is probable that any future court of appeals that finds itself obliged to address this issue will reach that conclusion. This Court might have cause to consider granting certiorari if a court of appeals were to hold that the *Parden* doctrine *survived* the decision in *Seminole Tribe*, and actually found a valid abrogation of sovereign immunity on that basis. But where, as here, the result is merely that *Parden* is held inapplicable, there is no reason for this Court to intervene. The obsolete *Parden* doctrine simply does not warrant further consideration by this Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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